No. 94013-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HARBOR PLUMBING,
Plaintiff/Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,
Defendant/Respondent.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Honorable Mary Sue Wilson, Judge

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# APPELLANT'S REPLY BRIEF

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## 1. INTRODUCTION

The Department has employed two general tactics. First, it has created four legal standards from whole cloth without any precedential support. Second, it has sought to obfuscate the importance of the issues.

## 2. ARGUMENTS IN REPLY

The Department has created the following unsupported legal standards, which will be addressed in order below:

- "Regulation" is the broad category comprising the Washington Administrative Code, and "rule" is merely a subcategory. BR at 1, 7, 9, 18, 19.

- If rulemaking does not end with a mandatory rule, then the due process right of notice was never required at the beginning (i.e. RCW 34.05.320 did not apply). BR at 12, 18, 20-21.

- The later action of the Department retroactively absolves it of prior misconduct. BR at 1, 5, 10, 12, 18-22, 24, n.2, n.4

- Repetition of an unlawful act creates "tradition," which in turn exculpates the Department. BR at 19-20, 43.

Finally, because the Department has undertaken to argue the merits of Harbor's procedural claim, Section 2.5 will address briefly that topic.

### 2.1 Is WAC 296-400A-024 a regulation but not a rule? Does it matter?

The Department has smartly changed the nomenclature from "non-rules" to "regulations that are not rules." CP at 86; BR at 1, 7, 9, 12. While this may be the case, the Department cites no definition of "regulation," nor any case law, supporting the conclusory statement that when a "voluntary regulation is not a 'rule' under the APA, the APA's rulemaking

requirements -including the notice requirements in RCW 34.05.320 -do not apply." BR at 12.

**a. The arguments as to what species the Department promulgated are not "new arguments on appeal," nor did Harbor "waive" them.** BR at 13-18; 25.

The Department makes the conclusory assertion that "Harbor Plumbing's amended complaint did not argue" that the non-rule might be considered "other agency action." BR at 25. The Department supports this conclusion by citing Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342 (2006).

In Shooting Park Ass'n, the plaintiff alleged tortious interference between itself and the city. Id. at 347-48. It did not plead interference between itself and other parties, but argued this entirely new claim only in response to the city's summary judgment motion. Id. at 348. The plaintiff even had an opportunity to amend its complaint but did not. Id.

It is disingenuous to insist that Harbor's discussion of the taxonomical implications of the Department's own 'non-rule' creature is first raised on appeal (or even at summary judgment). BR at 13. The Second Amended Complaint ("SAC") states "challenge is brought pursuant to RCW 34.05.570(2)…and related statutes." CP at 4. Presumably, the other subsections of RCW 34.05.570 are related statutes (and include challenges of "other agency action").

The SAC then states "Though not mandatory in final form the new rule was originally proposed as follows:" Id. Had some agency previously

behaved in such a bizarre fashion, Harbor might have had the benefit of precedent to better define WAC 296-400A-024. At a loss as to taxonomy, Harbor called it a "rule" that was "not mandatory." The trial court even called it a rule but "put 'rule' in quotes…." RP 16:22.

In any case, and true to form, the Department is essentially reviving a backdoor argument in favor of code-pleading. The true statutory basis for Harbor's challenge is RCW 34.05.320 and Harbor seeks a ruling that when agencies set out to make a rule, they must follow the proper notice and comment procedures.

The argument that Harbor has inaccurately aimed its pleadings is unsurprising given that the Department has been moving the target. WAC 296-400A-024 will remain elusive until some court ascribes it a legal status or rules on whether its taxonomy even matters in the face of improper rule summary under RCW 34.05.320.

Harbor pleaded RCW 34.05.570(2) "and related statutes" in anticipation that the non-rule might belong under one of the other classifications, including 'other agency action.' Then, as now, the questions remain (i) what species we are dealing with and (ii) whether it matters in the face of due process.

The Department does not accidentally devote pages to shadowboxing Harbor's alleged taxonomical arguments. By crying foul under RAP 2.5(a), the Department attempts to legitimize its faux doctrine (that non-rule finalization negates due process at the earlier notice and

comment stage). BR 13-18. By casting Harbor as having failed to achieve fitment within one or another subsection of RCW 34.05.570, the Department presumes and tacitly argues that such fitment is a prerequisite to enjoyment of due process.

Finally, the Department raises an interesting point that may militate toward a finding of 'rule' status (should such a finding be necessary in the wisdom of the Court). WAC 296-400A-024 "specifically addresses how to display the certificate, should a plumber choose to do so." BR at 17. When an agency 'specifically addresses how' one must behave should one elect to behave, has it made a rule?

**2.2 The end result of rulemaking does not determine the prior attachment of due process rights.**

"For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." Richmond Newspapers v. Va., 448 U.S. 555, 594 (1980) (Brennan, J. concurring). Notice of rulemaking is a procedural due process right. See e.g. State of Cal. ex rel. Lockyer v. FERC, 329 F.3d 700, 706 (9th Cir. 2003); Rybachek v. United States EPA, 904 F.2d 1276 (9th Cir. 1990); Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 215 (9th Cir. 1995) (holding statutory requirements of federal APA coterminous with constitutional due process requirements).

As with rulemaking, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to

accomplish it." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). The Department employed the terms "housekeeping" and "display" to notify the interested public of its intent to require worn credentials. CP at 70.

"A member of the public should not have to guess the [agency]'s 'true intent.'" State of Cal. ex rel. Lockyer, 329 F.3d 700, 707. The plumbers of Washington would need to sift through hundreds of lines of code section to discover that "displaying" was not the intent, but forced wearing of a state document.

The Department essentially argues that, because wearing was not ultimately required, the interested public had no due process right to notice that the Department was intending to require wearing -not "displaying"- credentials. Due process rights have been upheld even when an agency considers whether to approve admission to a "strictly voluntary" program. Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council, 129 Wn.2d 787, 800 (1996) (discussed infra at Section 2.2(b)).

**a. Failor's Pharmacy v. Dept. of Soc. & Health Servs., and related cases do not stand for the proposition that the sins of rulemaking are washed away by subsequent codification of a non-rule.**

The Department again recites the incantation of retro-absolvent non-rule magic to escape its due process obligations under the APA. BR at 10. In Failor's, DSHS changed the reimbursement calculation schema and resultant rates for Medicaid providers without any rulemaking procedure,

then notified the providers by "policy memoranda." Failor's Pharmacy v. Department of Social & Health Servs., 125 Wn.2d 488, 492 (1994).

In other words, DSHS made a rule without following APA rulemaking procedures. Failor's is silent as to what must happen in the instant case, which entails a completely different and conspicuously irregular procedure.

The Department cites Budget Rent A Car Corp. v. Dep't of Licensing for the proposition that its evasive, last minute 'non-rule' finalization 'axiomatically' absolves it of APA violations. 144 Wn.2d 889 (2001); BR at 10. Although the Department touts a good axiom, the inherently discombobulated nature of 'non-rule' promulgation defies analysis by such blind faith.

In Budget, the Department of Licensing ("DOL") adhered (through adjudication) to a rigid and literal interpretation of a mathematic formula to artificially inflate Budget's fleet size and, thus, its fee obligations. Id. at 894-95. DOL's stubborn refusal to account for ordinary logic was held to be a mere interpretation of rules and not rulemaking. Id. at 897-98.

Budget's 'axiom' does not fit the facts of the instant case. In Budget, there was no rulemaking. Here the Department took every step of rulemaking leading up to its final pirouette. The rulemaking in which the Department engaged was deficient. The proposed rule was not summarized for notice and comment as required by RCW 34.05.320 and related statutes.

**b. The doctrine of standing does not latently deprive Harbor of its due process right to notice.[1]**

The Department wrote a rule proposal identical to that which it had previously enacted as to electricians, then offered faux public notice of the proposed rule (as it had also done with the electrical rule), received a commensurate tiny handful of comments,[2] began enforcing the rule as mandatory, and finally enacted a 'non-rule' when Harbor Plumbing sought an injunction.

> Where an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court "routinely grants standing to a party" despite the fact that "any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative."

Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council, 129 Wn.2d 787, 794 (1996). In Seattle Bldg. & Constr. Trades Council, the state Apprenticeship Council had approved a private business' apprenticeship program for optional registration, which registration conferred various benefits upon the business. 129 Wn.2d 787, 791.

Though the Apprenticeship Council made no decision directly affecting appellants, they had standing because they believed the business' apprenticeship program was not qualified for registration. Id. at 792. If the

[1] Because standing was not a basis for summary judgment, the Department should not be allowed to raise it on appeal. RAP 2.5(a).

[2] The Department greatly exaggerates public participation in the rulemaking. BR at 22-24, 41. This serves two purposes: (i) it supports their inappropriate argument on the merits, that notice was sufficient and (ii) obfuscates the true reason for the procedural irregularity (which likely resides behind the redactions in the rulemaking record).

business had indeed been registered without meeting standards adopted by the Apprenticeship Council, it would be given an unfair economic advantage. Id. at 794. This Court noted that "'procedural rights' are special" and deprivation thereof need not be outcome determinative to constitute injury. Id. at 794-95 (citing 13 Charles A. Wright et al., Federal Practice & Procedure § 3531.4, at 433 (2d ed. 1984) ("often enough to show that an executive or administrative agency has failed to comply with procedural requirements that might have affected the ultimate decision, even though the decision might well have remained unchanged;" "[f]ailure to comply with procedural requirements of itself establishes sufficient injury to confer standing").

There are three steps to the relaxed standing requirement for due process infringement like that which the Department committed.

> In order to show a procedural injury, a party must (1) identify a constitutional or statutory procedural right that the government has allegedly violated, (2) demonstrate a reasonable probability that the deprivation of the procedural right will threaten a concrete interest of the party's, and (3) show that the party's interest is one protected by the statute or constitution.

Five Corners Family Farmers v. State, 173 Wn.2d 296, 303 (2011) (citing Summers v. Earth Island Inst., 555 U.S. 488, 496-97 (2009); Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001); Seattle Bldg. & Constr. Trades Council, 129 Wn.2d at 795).

Harbor's right to notice is both statutory and constitutional, as discussed supra at Section 2.2. The lack of notice has already demonstrably deprived most electricians and plumbers of the chance to comment. See e.g. CP at

68 (only two written comments and one hearing attendee). RCW 34.05.320 and the Fifth Amendment protect the due process interest in notice and comment.

**2.3 The Department's insistence on retroactive absolution is a pattern it now extends beyond APA analysis.** BR at 34-37.

The Department's argument about non-rule status under the APA is at least an academic exercise. However, to assert that non-rule status moots Harbor's UDJA challenge to RCW 18.106.020 apparently requires taking Harbor's statements out of context.

The Department falsely depicts Harbor "conceding that the…adoption of a voluntary regulation 'mooted the original…constitutional claims" under the APA as inclusive of those remaining in the complaint. BR at 34 (quoting AB 31-34). The mooted claims are dismissed and gone; were neither before this nor the trial court. The SAC does not contain them.

The Department knows the mooted claims were against the language of the mandatory form of the rule. That language was modified by the Department and the facial challenges were then mooted and dismissed. The Department knows Harbor has never conceded the latent mutation to a non-rule in the WAC affected its constitutional challenge to the RCW in any way, shape, or form.

Furthermore, the Department attempts to extend its retro-absolution theory into the final act of rulemaking. Though the Department had been enforcing the mandatory rule for a couple months, it later filed a "concise

explanatory statement" that indicated it would not be mandatory. BR at 5. The putative magical effect was that "[a]n agency can enforce a regulation only after adoption." BR at 5 n.2.

So, even though they were enforcing the rule in March, they were not enforcing the rule in March because in May the concise explanatory statement announced it was voluntary. CP at 44, 50-61. Those unwillingly wearing their licenses in March and April would likely disagree.

Similar to the Department's sleight of hand in conflating bygone APA mootness with UDJA constitutional claims, and glossing a rule requiring worn credentials as "displaying," it also wants to the Court to pretend it has not already been forcing private citizens to wear their licenses for years. BR at 31-33. Harbor has never attempted to "raise electricians' or any third party's legal rights" as the Department suggests. BR 31-32. This suggestion is an attempt to take out of context the Department's procedural irregularity. The Department wants the Court to wear blinders while analyzing how mature the seeds of dispute, how substantial and public the interest at stake, and the likelihood of recurrence.

### 2.4 Repetition and tradition do not justify due process infringement.

The Department employs an "everybody's doing it" argument to justify depriving stakeholders of proper notice and even the fundamental constitutional rights at issue on the merits. BR 19-20, 43. While strenuously objecting to any glance at its own conduct vis-à-vis other trades,

the Department urges this Court to examine what other agencies have inserted into the WAC as "tradition." BR at 19-20.

The Department illuminates no legal basis for the conduct of other agencies, nor does it demonstrate that its own procedural iniquities have been repeated elsewhere *and* judicially affirmed (as would be necessary). Yet the Department makes the disdainful further assertion that Harbor's fundamental rights should be discounted because "[i]t is common for people to wear identification at work." BR at 43. The Court should reject these arguments, unsupported by law and born of a nanny state attitude.

### 2.5 If the Court accepts the Department's invitation to decide the merits of Harbor's procedural claim, the Court should find that using the word "display" did not notify plumbers they would need to wear their licenses.

The Department undertakes an argument on the merits over its violation of RCW 34.05.320 rule proposal summary requirements. BR at 22-24. The Department extends an invitation down this path, noting "this Court can affirm on any grounds supported by the record…." BR at 22.

The Department urges the Court that it "complied with rulemaking procedure." BR at 22. The trial court rejected this same argument when the Department moved for dismissal under CR 12(b)(6). CP at 189-92. Harbor stands by its analysis in "Plaintiff's Reply to Defendant's Motion on CR 12(b)(6)." CP at 196-222. In summary, the average person seeing "display" would not conclude the Department was about to make a rule forcing private citizens to "wear" state credentials.

## 2.6 Major Public Importance

The world has recently experienced a rise in authoritarianism reminiscent of the political climate preceding World War II. Society stands on a precipice where every miniscule act or omission may drastically alter the fabric of the near future.

Under these circumstances, Harbor Plumbing and Christopher Dubay feel duty-bound to resist complacency, to risk reputation and capital against even the most seemingly banal infringement of civil rights. In this way, Harbor dutifully participates in the government of, by and for the people.

The Department can do no other than deflect attention from its conduct and the repetition thereof, and most disturbingly, to countenance its arguments in the wounded sensibilities of the incredulous citizen who cannot fathom the visceral effects, and is aghast at the historical context, of its actions. BR at 42-43; n. 9. This deviant version of righteous indignation seems to be going around these days.

The Department has exhibited the same aloof emotional turmoil that finds the President and Vice President, both of whom avoided military service during a draft, awash in the vicarious pain of servicemembers who they imagine suffer with every black American knee planted in defiance of police brutality. Just as the occupants of the White House cannot convincingly assert the subjective impressions of servicemembers (much less the protesters), the Department is unqualified to relate to the importance

of its actions, and rightly finds it "hard to understand how requiring plumbers to wear their professional credentials works a 'visceral invasion' into the plumber's mind." BR at 42-43.

The premise of an emotionally fragile Department/Executive is dangerous to accept because it permits an intellectually dishonest humanization expectant of its own individual rights. It can therefor erect a false parity, pitting individual civil rights against its own fictitious, hypersensitive right not be burdened with the terrible thought of Nazi conduct or of the depth of American values like bodily autonomy, privacy, and silence by right.

However, the upshot is the Department functionally donning historical blinders and belittling the values Americans hold most dear. The analysis need not reach the Department's histrionic "Nazis forcing Jews to wear the Star of David," as the Nazis forced plenty of citizens to wear state documents for less than immutable characteristics. BR at 42 n. 9.

The passage that so offended the Department in the electrical companion case reads in relevant part:

> The badges sewn onto prisoner uniforms enabled SS guards to identify the alleged grounds for incarceration. Criminals were marked with green inverted triangles, political prisoners with red, …with black or…brown triangles. Homosexuals were identified with pink triangles and Jehovah's Witnesses with purple ones. Non-German prisoners were identified by the first letter of the German name for their home country, which was sewn onto their badge.

www.ushmm.org/wlc/en/article.php?ModuleId=10005378 (United States Holocaust Memorial Museum, "Holocaust Encyclopedia." Copyright © United States Holocaust Memorial Museum, Washington, DC. Encyclopedia last updated: January 29, 2016) (Emphasis added).

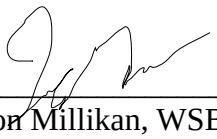
Harbor will not ignore history just to soothe the tender sensibilities of the Department. The Department needs to toughen up and realize humans, American citizens, find it important and abhorrent when their bodies are subjected to mandatory government control. The recalcitrance of American freedom may be its saving grace.

## 3. CONCLUSION

As this Reply Brief is being typed, the morning news explains that the President of the United States is urging broadcast license revocation for those networks that criticize him. During these times, no civil right can be too carefully guarded. For the first time in its history, Washington State has forced the private citizen to wear a state document. The same Department has all but forced plumbers to do the same and will almost certainly try again if not held to judicial account. "The Department will evaluate if there is a need for more stringent language in the future." CP at 68. This is a ripe matter of major public importance.

**Declaration of Service**

The undersigned hereby declares under penalty of perjury by Washington State laws that he served this brief on all necessary parties according to the terms of the parties' electronic service agreement on this 12th day of October, 2017, from the Law Office of Jackson Millikan in Thurston County,



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